

TESTIMONY BY KANOE MARGOL  
INTERIM EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM  
STATE OF HAWAII

TO THE HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT  
ON  
SENATE BILL NO. 1324, S. D. 2

MARCH 24, 2015, 9:30 A.M.

RELATING TO DIVORCE

Chair Nakashima, Vice Chair Keohokalole and Members of the Committee,

S.B. 1324, S.D. 2 proposes to require the Employees' Retirement System (ERS) to make direct payments to a non-member former spouse a portion of the member's pension, annuity or retirement allowance by a final judgment, order or divorce decree.

The ERS Board of Trustees strongly opposes this bill. This proposal provides no benefit to the ERS membership. Further, the current version of this proposal replaced the general fund appropriation with a requirement that the cost for its implementation be completely funded by the ERS. This cost will only add to the System's \$8.6 billion unfunded liability; a liability which the ERS, the Administration and the Legislature has conscientiously worked to reduce over the last 5 years.

Therefore, considering the ERS' unfunded liability situation that already jeopardizes the System's promised benefits to current and future retirees, the ERS requires an appropriation out of the State general fund (versus ERS funds) for the implementation of this bill, should your Committee choose to move this bill forward, despite the strong opposition of the ERS Board of Trustees.

To effectuate the changes to the ERS computer system required by this proposal (adding non-members to the System's data base, tracking and monitoring judgments, orders and decrees from the date of receipt to the date of implementation, calculating, adjusting and issuing direct payments to non-members, adding and maintaining alternate payee accounts, preparing and issuing federal tax income tax statements, monitoring address and account changes and death verifications for non-member payees, etc.) was estimated upwards of \$1 million. In addition, funds will be needed for the on-going and future resources necessary to review, interpret, clarify, correct and seek legal and actuarial advice if there are problems with interpreting an order. Additional staff resources would also be needed to calculate and process these additional benefits, and S.B. 1324, S.D.2 provides no provision for an ERS administrative fee for this additional processing.

The ERS staff also has technical and operational concerns with respect to this bill which are attached for the Committee's consideration. In addition, if this bill moves forward, ERS staff requests that the funding provision be made effective July 1, 2015, and that the effective date of the substantive changes be July 1, 2017. This is because the ERS would require the funds up front and to allow for modifications to the ERS pension computer system, rule-making, communication and educational outreach and other operational changes, while requiring

additional time to actually complete the computer modifications, rule-making, communication and educational outreach , and other operational changes to implement the measure.

Thank you for the opportunity to provide testimony on this measure.

Date: March 24, 2015

To: House Committee on Labor and Public Employment

From: Employees' Retirement System Staff

Re: Staff Comments on S.B. 1324, S.D. 2

Attached to this memo are proposed revisions to section 2 of SB 1324, SD 2 reflecting ERS staff comments intended to correct technical defects and to incorporate changes that are necessary to provide clarity or to reduce costs and burdens on ERS resources. The following summarizes and explains the proposed revisions to the new section to be added to chapter 88 by SB 1324, SD2:

1. Revises (a)(3) to apply to refunded contributions. This prevents a member from evading an order by taking a refund of contributions instead of retiring.
2. Adds (a)(5) which provides for the adoption of a model form of order by the ERS. This will facilitate compliance with the statute by the parties, particularly those who do not have lawyers, and will facilitate review and processing of the order by the ERS.
3. Amends (d) to provide that the ERS is not bound by an order that requires the designation of a particular person to receive benefits upon the death of the member or retirant or that requires the selection of a particular retirement allowance option. Failure to provide the exemption would place a tremendous administrative burden on the ERS. The ERS receives approximately 2000 retirement applications per year, most at the end of the calendar year and often only thirty days before the applicant's intended retirement date. If the ERS were bound by court ordered beneficiary designations or court ordered retirement option selections, the ERS could not accept a retirement application until it checked its records to determine whether there is an order affecting the designation of beneficiary or selection of retirement option by the applicant and, if there is such an order relating to the applicant, the ERS would have to check the application to confirm that the application is consistent with the order and, if it is not, would have to reject the application. This could delay the commencement or finalization of retirement benefits for all applicants. The order should be limited to the division of the benefit payable to the retirant under whichever retirement option the retirant has selected. There are other means of protecting a former spouse from the impact of the retirant's selection of a retirement option that significantly reduces the retirant's monthly benefit than by requiring the ERS to review every retirement application to assure compliance with a possible court order affecting selection of beneficiary or retirement option. If the order is

limited to division of benefits (or refunds) that are payable, the ERS will "only" be required to review the **order** for compliance with the statute.

4. Adds (d)(8) to clarify that if the member or retirant will be receiving a lump sum payment, the former spouse's share will be paid in a lump sum instead of as a monthly benefit.
5. Adds (j) to address situations where an order is still under review when benefits or other payments become payable to a member or retirant and to allow the parties to seek an amended order if the order does not comply with the statutory requirements.
6. Adds (k) to confirm that the ERS should not be made a party to the domestic relations proceeding which generates the order. (This does not prohibit a party from filing of a contested case petition against the ERS if the party contests the ERS's determination that an order does not comply with the statute; however, it would probably be more expeditious to go back to the family court for an amendment to correct the defect in the order.)
7. Confirms that a former spouse receiving a monthly benefit may also receive the post retirement allowance under section 88-90.
8. Authorizes an administrative fee for processing payment under an order.

The reduction of the original estimated cost of the changes to the computer system is based on the adoption of ERS staff's comments to the original version of this bill.

Proposed revised section 2 of SB 1324, SD2 (redlined against section 2 of SB1324, SD2; underscoring in SB 1324, SD 2 intentionally omitted):

SECTION 2. Chapter 88, Hawaii Revised Statutes, is amended by adding a new section to part II to be appropriately designated and to read as follows:

**"§88- Distribution of property in a divorce action.** (a) If a final judgment, order, or decree in a divorce action awards the spouse or former spouse of a member or retirant a portion of the pension, annuity, retirement allowance, or refunded contributions of the member or retirant, that portion shall be paid directly to the spouse or former spouse of the member or retirant; provided that the judgment, order, or decree:

- (1) Identifies the member or retirant and spouse or former spouse by name, address, and last four digits of social security number;
- (2) Directs the system to make payment of the share of the spouse or former spouse directly to the spouse or former spouse;
- (3) States the amount or percentage of the member or retirant's benefits or refund of contributions to be paid by the system to the spouse or former spouse, or the manner in which the amount or percentage is to be determined;
- (4) Specifies that each party shall be liable for any taxes on the share of the pension, annuity, retirement benefit, or refunded contributions directly received by the party from the system; ~~and~~
- (5) Conforms to a model order adopted by the system; and
- (6) Does not require the system to:
  - (A) Provide any type or form of benefit, or any option, not otherwise provided by the system;

- (B) Provide increased benefits, determined on the basis of actuarial value; or
- (C) Require the system to provide benefits or refunds to the spouse or former spouse that are required to be paid to another spouse or former spouse pursuant to another judgment, decree, or order subject to this section.

(b) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity, or retirement allowance under this section shall commence on the later of:

- (1) The month following the month in which the system receives a judgment, decree, or order complying with the requirements of subsection (a) and payment to the system of any fees and charges for review and processing of the judgment, decree, or order; or
- (2) Commencement of the member or retirant's retirement benefits.

(c) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity or retirement allowance under this section shall terminate upon the earlier of:

- (1) ~~Death~~ Death of the former spouse; ~~or~~
- (2) ~~or the death of the retirant; whichever occurs earlier.~~

(d) The system shall not be bound by any judgment, decree, or order made pursuant to a domestic relations law of this State or another state that:

- (1) Requires the designation by a member or retirant of a particular person as the recipient of benefits upon the death of the member or retirant;
- (2) Requires the selection of a particular payment plan or option or to limit the benefit payment plans or options which the member or retirant may select;

- (3) Requires any action on the part of the system contrary to governing law other than the direct payment of the benefit awarded to the spouse or former spouse of a member or retirant;
- (42) Makes the award to the spouse or former spouse an interest that is contingent on any condition other than those conditions resulting in liability of the system for payment under governing law;
- (53) Purports to give someone other than a member or retirant the right to designate a beneficiary or to choose any retirement plan or option available from the system;
- (64) Attaches a lien to any part of amounts payable with respect to a member or retirant; provided that nothing in this subsection shall be construed as limiting the ability of the child support enforcement agency from collecting child support arrearages from benefits;
- (75) Awards a spouse or former spouse of a member or retirant a portion of the benefits payable with respect to a member or retirant under the system and purports to require the system to make a lump sum payment of the awarded portion of the benefits to the spouse or former spouse that are not payable in a lump sum;
- (8) Awards a spouse or former spouse a portion of benefits payable to a member or retirant in a lump sum or a portion of any contributions withdrawn by a member, former member or retirant and purports to require the system to make a payment to the spouse or former spouse in any form other than a lump sum; or



(69) Purports to require the system, without action by the member, to terminate a member from membership or employment, to refund contributions, or to retire a member.

(e) For the purpose of calculating earnings limitations for retirants who have been restored to service, the retirant's maximum retirement allowance shall be considered to be the amount that would have been paid if there had been no judgment, order, or decree for the payment of any portion of the retirant's pension, annuity, or retirement allowance to the retirant's spouse or former spouse.

(f) If a member terminates membership in the system by withdrawal of contributions, the system shall pay all or a portion of the amount withdrawn to a former spouse as directed by a judgment, order, or decree meeting the requirements of subsections (a) and (b). If the former member later resumes membership in the system, the system shall pay to the spouse or former spouse no portion of any benefits payable to the member or retirant that results from the resumption of membership, even if those benefits result in part from reinstatement of service credit initially credited during the marriage.

(g) Subsection (f) notwithstanding, in order to receive credit for all service represented by withdrawn or refunded contributions, a member who in reinstating service credit by repaying amounts previously withdrawn or refunded shall repay the entire amount withdrawn or refunded, regardless of whether a portion or all of the amount was paid to a spouse or former spouse.

(h) When the system has not yet begun to make payment to a spouse or former spouse under this section and is provided with proof of the death of the spouse or former spouse, benefits payable with respect to the member or retirant shall be paid without regard to the judgment, order, or decree providing for payment to the spouse or former spouse.



(i) If a member or retirant or the beneficiary or estate of either receives the amount of any distribution that should have been paid by the system to the spouse or former spouse of the member or retirant, the recipient shall be designated a constructive trustee for the amount received and shall immediately transmit that amount to the person to whom the amount should have been paid. If a spouse or former spouse of a member or retirant, or the estate, heirs, or legatees of the spouse or former spouse receives any amount of a distribution that should have been paid to a member or retirant, or the estate, heirs, or legatees of either, the recipient shall be designated a constructive trustee for the amount received and shall immediately transmit that amount to the member or retirant or other person to whom the amount should have been paid to the recipient. If a member, retirant, or the beneficiary, estate, heirs, or legatees of either, receive any amount that should not have been paid by the system, the recipient shall be designated a constructive trustee for the amount received and shall immediately transmit that amount to the system.

(j) If upon review of a judgment, order or decree, the system determines that the judgment, order or decree does not comply with this section, the member, retirant or former spouse may, in addition to any other remedies, petition the court which issued the judgment, order or decree, to amend the judgment, order or decree so that it does comply with the requirements of this section. The court which issued the judgment, order or decree or which would otherwise have jurisdiction over the matter has jurisdiction to amend the judgment, order or decree so that it complies with the requirements of this section even though all other matters incident to the action or proceeding have been fully adjudicated. During any period in which a judgment, order or decree is under review by the system or a court of competent jurisdiction for compliance with this section, the system shall separately account for the amounts, in this section

referred to as the "segregated amounts," which would have been payable to the spouse or former spouse during such period if the judgment, order or decree had been determined to be in compliance with this section. If a judgment, order or decree is determined to be in compliance with this section, then the system shall pay the segregated amounts without interest to the spouse or former spouse as provided in the judgment, order or decree and shall thereafter pay benefits pursuant to the judgment, order or decree. If a judgment, order or decree is determined not to be in compliance with this section, the system shall pay the segregated amounts without interest and shall thereafter pay benefits to the person or persons who would have been entitled to such amounts if there had been no judgment, order or decree. This subsection shall not be construed to limit or otherwise affect any liability, responsibility, or duty of a party with respect to any other party to the action out of which the judgment, order or decree arose.

(k) A court does not have jurisdiction over the system with respect to a divorce or other domestic relations action in which a spouse's or former spouse's right to receive all or a portion of the benefits payable to a member or retirant is created or established. A party to such an action who attempts to make a the system a party to the action contrary to the provision of this subsection shall be liable to the system for the system's costs and attorney's fees.

(l) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity or retirement allowance under this section may include the post retirement allowance under section 88-90.

(m) The board shall adopt rules in accordance with chapter 91 and produce such forms as it deems necessary to effectuate this section. The board may, by motion at a duly noticed meeting of the board, establish and revise from time to time:

- (1) A filing fee for the processing and review of judgments, orders, and decrees issued for the purposes of this section; ~~and~~
- (2) A schedule of charges for legal and actuarial services incurred by the system in the review and processing of judgments, orders, and decrees issued for the purposes of this section; ~~and~~
- (3) A fee, in proportion to the benefits paid to the retirant and former spouse, for the administration of payments under an order subject to this section, which fee may, in addition to other methods of collecting fees that the system may establish, be deducted from the benefit payment."

**FAMILY LAW SECTION  
OF THE  
HAWAII STATE BAR ASSOCIATION**

737 Bishop Street Suite 1450  
Honolulu, Hawaii 96813  
[www.hawaiiifamilylawsection.org](http://www.hawaiiifamilylawsection.org)

CHAIR  
ELIZABETH PAEK-HARRIS  
[Elizabeth@epaeklaw.com](mailto:Elizabeth@epaeklaw.com)

VICE-CHAIR / CHAIR-ELECT  
DYAN K. MITSUYAMA  
[dyan@mitsuyamaandrebman.com](mailto:dyan@mitsuyamaandrebman.com)

SECRETARY  
TOM TANIMOTO  
[ttanimoto@coatesandfrey.com](mailto:ttanimoto@coatesandfrey.com)

TREASURER  
NAOKO MIYAMOTO  
[n.miyamoto@hifamlaw.com](mailto:n.miyamoto@hifamlaw.com)

March 23, 2015

To: House Committee on Labor & Public Employment  
Representative Mark M. Nakashima, Chair  
Representative Jarrett Keohokalole, Vice-Chair

From: Dyan K. Mitsuyama, Vice-Chair/Chair Elect  
Family Law Section, Hawaii State Bar Association

Re: Testimony in Support of SB 1324 SD2  
Hearing: Tuesday, March 23, 2015 at 9:45 a.m.

Good morning, Chair Nakashima, Vice Chair Keohokalole and the members of the Committee on Labor & Public Employment. My name is Dyan K. Mitsuyama, a partner in Mitsuyama & Rebman, LLLC, a law firm concentrating in all family law matters. I have been a licensed attorney here in the State of Hawaii for about 16 years now. I am the current Vice-Chair/Chair-Elect of the Family Law Section of the Hawaii State Bar Association ("FLS"), which is comprised of approximately 136 licensed attorneys state-wide all practicing or expressing an interest in practicing family law.

FLS submitted testimony in support of this bill's companion, HB1370 HD1 last week. I apologize for the late testimony submission for this bill, but thank the committee for the opportunity to submit it now.

The Family Law Section supports the intent of this measure as it is much needed to ensure that the division of an Employees' Retirement System member's retirement benefits are correctly divided and promptly paid with the appropriate tax consequences for both the member and the non-member former spouse by way of Court order.

Only private employers are required to abide by the Employee Retirement Income Security Act (ERISA) which provides for non-member former spouses to receive retirement benefits awarded as a result of divorce property division directly from the retirement plan's administrator pursuant to a Qualified Domestic Relations Order (QDRO). The federal government as well though allows for direct payment to former spouses of retirement benefits as a result of divorce by and through a court order. Currently, the Hawaii state system does not provide for that.

This leads to much uncertainty and increased litigation for both the retired member and the non-member former spouse. Personally, through my practice, I have represented both members and non-members in the enforcement of the division of the retirement system's benefits because there is no automatic method as in the case of those employed by the federal government or private sector. Currently, there is no system of record-keeping.

Falling in line with the practice for the division of retirement benefits earned in the private sector or federal government will not only be "fair" but it will also decrease litigation in this context. It will assure that the non-member is required to claim the funds received as income on her tax returns and assure that the member will not be held liable for the portion received by the non-member.

Because it is much needed, the effective date should be sooner than 2059.

*NOTE: The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.*



**TESTIMONY OF THOMAS D. FARRELL**  
Regarding Senate Bill 1324, SD 2 Relating to Divorce

House Committee Labor and Public Employment  
Representative Mark Nakashima, Chair

Tuesday, March 24, 2015 9:45 a.m.  
Conference Room 309, State Capitol

Dear Representative Nakashima and Members of the Committee:

I support SB 1324.

All retirement plans, including ERS, are marital property and are divisible by the Family Court in a divorce action. This legislation does not change that. In most cases, when a non-member is awarded a share of a member's retirement plan, direct payment can be had from the plan administrator. In the private sector, this occurs by way of a "Qualified Domestic Relations Order" and there are similar devices in the case of military and federal Civil Service retirement pay. However, because of the inalienability provisions of Chapter 88, when ERS retirement plans are divided in a divorce, the plan member must make the payment to the former spouse and the plan administrator is not allowed to do so. This bill would reverse that and bring ERS into line with all other retirement plans.

This change would benefit the former spouse as well as the ERS member. In the case of the former spouse, the bill would ensure that he or she gets what the court ordered. In the case of the member, the bill would relieve him or her from a lifetime of writing monthly checks, and would also ensure that the ERS retiree is taxed only on that portion that he or she actually receives.

I have reviewed the language and technical amendments incorporated into Senate Draft 2 and have no objection to them.

I note that the ERS Board opposes this bill because of the cost of implementation. In testimony to the Senate Ways and Means Committee on 2/27, ERS claimed that it will take a million dollars to implement this, and in testimony on 3/4 to the House Finance Committee, ERS upped its estimate to \$2 million---a figure they maintained on 3/20 during testimony before the Senate Committee on Judiciary and Labor. I suggest to you that these numbers are utter nonsense, and are not supported by any serious analysis.

Divorce ♦ Paternity ♦ Custody ♦ Child Support ♦ TROs ♦ Arbitration  
*also handling national security cases involving revocation or denial of security clearances*

---

700 Bishop Street, Suite 2000, Honolulu, Hawaii 96813  
Telephone 808.535.8468 ♦ Fax 808.585.9568 ♦ on the web at: [www.farrell-hawaii.com](http://www.farrell-hawaii.com)

---

\*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

There are about 5,000 divorces per year that are granted in Hawaii. About 1.4M people live in the State of Hawaii. This includes all the military folks that are assigned here. There are about 70,000 state and county employees. If the proportion of divorces involving state or county employees is the same as their proportion to the general population, then 5% of divorces will involve at least one ERS member spouse. That's a potential universe is 250 decrees per year to handle. However, most divorce decrees don't divide pension benefits; this tends to occur only in long marriages where there aren't sufficient assets to award the non-member to offset his/her interest in the member's pension. Perhaps 20% of these divorces would involve division of the ERS pension. That gets it down to about 50 cases per year. While there are potentially hundreds of divorce decrees out there that already divide ERS pensions, none of them will comply with the requirements that SB 1324 will impose without a trip back to Family Court for amendment. Most people aren't going to do that if the retirant is making direct payment in accordance with the existing decree or hasn't retired yet. The bottom line is that it shouldn't take \$2M to process 50 or so divorce decrees a year.

ERS has previously defended their inflated estimate by claiming that this number was given to them by the contractor who has designed their proprietary computer system. They say it takes \$2 million to rewrite the program to allow payment to a third-party non-member. That's nonsense because ERS is making deductions from members' retired pay and sending it to third-parties already. They withhold federal taxes, for example, and send them to the IRS. And they withhold child support when presented with a child support income withholding order, which can come from any one of literally hundreds of child support enforcement agencies throughout the country.

So don't let ERS scare you with big numbers that have no basis in fact. The real reason is that they just don't want to be bothered to do this. Everyone else does, however, and it's time for ERS to join the rest of the world.



# KLEINTOP, LURIA & MEDEIROS

A LIMITED LIABILITY LAW PARTNERSHIP

CHARLES T. KLEINTOP  
TIMOTHY LURIA  
DYAN M. MEDEIROS

DAVIES PACIFIC CENTER, SUITE 480  
841 BISHOP STREET  
HONOLULU, HAWAII 96813

TELEPHONE:  
(808) 524-5183

FAX:  
(808) 528-0261

NAOKO C. MIYAMOTO  
CATHY Y. MIZUMOTO

EMAIL:  
D.Medeiros@hifamlaw.com

TO: Representative Mark M. Nakashima, Chair  
Representative Jarrett Keohokalole, Vice-Chair  
Committee on Labor and Public Employment

FROM: Dyan M. Medeiros  
E-Mail: [d.medeiros@hifamlaw.com](mailto:d.medeiros@hifamlaw.com)  
Phone: 524-5183

HEARING DATE: March 24, 2015 at 9:30 a.m.

RE: Testimony in Support of SB1324 SD 2 Relating to Divorce

Good morning Representative Nakashima, Representative Keohokalole, and members of the Committee. My name is Dyan Medeiros. I am a partner at Kleintop, Luria & Medeiros, LLP and have concentrated my practice solely in the area of Family Law for more than sixteen (16) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I submit this testimony in support of SB1324 SD2.

SB1324 SD 2 would solve an ongoing problem for both ERS members and their former spouses, namely the implementation of Court orders dividing ERS retirement benefits. Hawaii law allows the Family Court to award a portion of an ERS member's retirement benefits to their former spouse in divorce cases. This often happens. However, Hawaii law prohibits ERS from paying the former spouse his or her share of those benefits directly.

This means that upon retirement an ERS member must notify his or her former spouse that he or she has retired, must then calculate the amount of retirement benefits that are owed to the former spouse, and then must send a check to the former spouse each month. At the end of each year, the ERS retiree receives a 1099-R showing that he or she has received 100% of their retirement benefits even though they have paid some of it to their former spouse. Whenever an ERS retiree receives a cost-of-living allowance, he or she must re-calculate the amount owed to their former spouse. The former spouse must rely on the ERS retiree to notify them of the retirement and to send a check each month. If the ERS retiree fails to send a check, the former spouse must figure out a way to obtain his or her payment, including by going to Court. This imposes a significant burden on both the ERS retiree and their former spouses.

SB1324 SD2 would end all of this by allowing ERS to send a check each month to the former spouses of ERS retirees. This is something that routinely happens with retirement plans in the private sector and with federal retirement plans. There is no reason for ERS members and their former spouses to be denied this same type of benefit.

Thank you.